faith requirement does not exist as part of 11th Circuit jurisprudence.

Eleventh Circuit law on this area is set forth in two cases. United States v. Schaefer, 709 F.2d 1383 (11th Cir. 1983) and United States v. Saintil, 753 F.2d 984, (11th Cir. 1985). Both cases applied the Valenzuela-Bernal test to defendants' claims of 6th Amendment compulsory process violations. In Saintil, this Court found that to prove a violation of the defendant's rights from the government's deportation of a witness, a defendant "must show some reasonable basis to believe that the deported witness would testify to material and favorable facts." *Citing* Schaeffer.

In Schaeffer, the 11th Circuit recognized that,

> We understand that a defendant cannot show exactly what a deported witness would say and that the showing of materiality required of the defendant must be relaxed since the government is responsible for defendant's lack of access to [the witness]. Materiality, however, cannot be completely dispensed with under Valenzuela-Bernal:
> Because prompt deportation deprives the defendant of an opportunity to interview the witnesses to determine precisely what favorable evidence they possess ... the defendant cannot be expected to render a detailed description of their lost testimony. But this does not ... relieve the defendant of the duty to make some showing of materiality. 458 U.S. at ----, 102 S.Ct. at 3449, 73 L.Ed.2d at 1206. See also id. at ----, 102 S.Ct. at 3447-48, 73 L.Ed.2d at 1204. A defendant cannot simply hypothesize the most helpful testimony the deported witness could provide. Rather, he must show some reasonable basis to believe that the

> deported witness would testify to material and favorable facts. Cf. id. at ----, 102 S.Ct. at 3449-50, 73 L.Ed.2d at 1206 (defendant must make a plausible showing that the lost testimony "would have been," not might have been, material and favorable).

Thus, the test to be used by the District Court was to determine only whether the Petitioner could make a plausible showing that Venegas possessed information that was both material and favorable. The Affidavit of Silva does this. (R. 23) This affidavit provides that Venegas would have stated that the prior statement he made was coerced and untrue, and that Petitioner had no knowledge of his illegal status. This was the central issue in the Government's case, and Venegas was the only person who could have corroborated the Petitioner's version. Venegas' testimony was more than merely material and favorable it was essential to the defense.

The Eleventh Circuit ultimately denied relief by accepting the new "bad faith" requirement and additionally finding that the the United States had not "deported" Venegas, merely by allowing him to leave.

In finding no bad faith, the Eleventh Circuit virtually ignored the plain statements of Attorney Silva, and found that Petitioner had no reason to believe Venegas would have provided favorable testimony. This is much to high of a burden for any defendant to meet in similar contexts. We must remember, we deal with not a procedural rule or statute, but a fundamental Sixth Amendment right to the compulsory process of a witness. Since this Court issued its opinion in Valenzuela-Bernal protecting and defining this Sixth Amendment Right, the lower courts have sought to narrow and limit Defendants' abilities to present an effective defense. The Eleventh Circuit ruling in this matter and similar cases in

other Circuits must be held in check by this last bastion of constitutional protection.

Lastly, while the Eleventh Circuit found there was no deportation, the United States is certainly responsible for the swift unavailability of Venegas. Venegas had previously been denied admission to the United States. He was currently in the United States illegally. Such an incident normally requires a series of immigration proceedings to determine the removability of the alien. Additionally, Venegas' status should have resulted in criminal charges to Venegas. But he was given a choice, tell the Government Agents what they wanted to hear and he would be released and allowed to return to Mexico. Venegas may not have been formally deported, but the United States certainly acted swiftly and outside of normal operating procedures to insure he would not be here during the time of the trial.

The Eleventh Circuit has allowed to stand a significant impediment to the compulsory presence of a witness favorable to a defendant. At this time, the United States is free to seek incriminating statements from a witness, whether true or false, and then simply allow the witness to choose between a swift departure from the United States or face several months in prison and possibly criminal charges while they await the defendants trial. Without notice of the witnesses impending departure the Defendant is powerless to stop it. Further, if the witness makes his statements prior to the defendant's arraignment, the defendant may not even know such statements were made before the United States has swiftly ushered the witness across the border and out of the defendant's ability to contact him or her. There exists nothing the Defendant can do to verify the veracity of those statements, produce the witness, or otherwise demonstrate that the witness could have provided **any** favorable

information to the defense. This is not what the Sixth Amendment contemplates and should not be allowed to stand by this Court.

CONCLUSION

For the above stated reasons, Petitioner respectfully requests that this Court grant certiorari in this matter and ultimately vacate the conviction due to violations of the Petitoner's Sixth Amendment right to compulsory process of witnesses.

Respectfully Submitted,

Robert A. Ratliff
Counsel of Record
713 Dauphin Street
Mobile, AL 36602
(251) 438-2250

Attorney for the Appellant

May 10, 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-13206

[Filed February 14, 2006]

UNITED STATES OF AMERICA,	)
Plaintiff-Appellee,	)
versus	)
SHANNON MCCULLOUGH, a.k.a. Shannon McCullough Boyington,	)
Defendant-Appellant.	)

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 04-00156-CR-CB

Before ANDERSON, BIRCH and CARNES, Circuit Judges.

OPINION

PER CURIAM:

Shannon McCullough appeals her convictions for transporting and harboring an illegal alien in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and (iii). We affirm.

In 2003, McCullough and her boyfriend, Rosalio Venegas Sanchez, a Mexican citizen, were living together at McCullough's house in Foley, Alabama. In December of 2003, Venegas returned to Mexico to visit his family. In January of 2004, McCullough traveled to Mexico and helped Venegas obtain a B-2 visitor visa so that he could come back to the United States. McCullough then accompanied Venegas to the border at Hidalgo, Texas. On January 6, 2004, the United States Customs and Border Protection Office ("USCBP") denied Venegas permission to enter the United States because he had previously entered the country illegally. The USCBP cancelled Venegas' visitor visa, informed him that he could not legally enter the United States, and allowed him to return to Mexico.

On March 5, 2004, Senior Border Patrol Agent Kevin Douglas learned that Venegas had returned to Foley, Alabama and was again living with McCullough. Administrative checks revealed that Venegas was not legally admitted into the United States. On May 10, 2004, Douglas stopped Venegas after he left McCullough's residence and questioned him. Venegas told Douglas that he had entered the United States illegally at Hidalgo, Texas in February of 2004. In a sworn written statement, Venegas stated that McCullough, knowing that he was an illegal alien, had picked him up in Houston and paid a smuggler for transporting him to the United States. Douglas later swore in an affidavit that he did not coerce Venegas into providing the statement.

Venegas was informed that he could be charged administratively for violating immigration laws, or he could

waive his procedural due process rights and be eligible for an immediate, voluntary return to Mexico. Venegas chose the latter and was returned to Mexico on May 13, 2004. McCullough was indicted on one count of transportation of an illegal alien and one count of harboring and concealing an illegal alien on July 29, 2004.

On November 8, 2004, the government sent a letter to McCullough's attorney, Riguer R. Silva, stating that it had filed for permission for Venegas to reenter the United States as a witness and would pay for his travel and lodging. The government requested that Silva provide additional contact information for Venegas, including his full name, address, telephone numbers, and any unique identifying numbers, before November 12, 2004, so that it could complete his travel arrangements.

On November 12, 2004, McCullough filed a motion to dismiss the indictment, alleging that Agent Douglas had arranged for Venegas to leave the United States before she had an opportunity to depose and cross examine him, compromising her ability to obtain evidence for her defense. In support of her motion, McCullough filed the affidavit of Silva, in which he swore that he had made numerous attempts to contact Venegas in Mexico, but was able to speak with him only once because he did not have a telephone and lived in a remote area without a mailing address. Silva stated that Venegas had told him that the sworn statement he gave to Douglas was false and coerced, and that he had never told Douglas that McCullough knew that he was an illegal alien. Silva further stated that he did not have the resources or time to secure contact information for Venegas.

At a November 30, 2004 hearing on McCullough's motion to dismiss the indictment, the district court stated that it was

McCullough's burden to prove that, at the time the government facilitated Venegas' return to Mexico, his testimony would have been favorable to her. The court observed that the government had tried to bring Venegas to the United States for trial. McCullough stated that the four days the government had given her was not enough time to obtain Venegas' contact information, and that she only knew "half" of the information requested by the government. The government responded that it had been in contact with Silva since August or September and had discussed the need for more information about Venegas on several occasions, and that the November 12, 2004 deadline was chosen to give the government enough time to bring Venegas to the United States before the trial, which was scheduled for November 30, 2004. McCullough then argued that the government had acted in bad faith by allowing Venegas to leave. The court responded: "What . . . difference does it make that there was bad faith, arguably, even if everything you say is true and that . . . amounts to bad faith, if in fact at the time the statements he made were favorable to the government?"

The district court entered an order denying McCullough's motion to dismiss the indictment, finding that there was an insufficient basis to support the allegations in the motion. After a bench trial, the district court found McCullough guilty on both counts of the indictment. The district court sentenced McCullough to one day of imprisonment and four months of home confinement.

On appeal, McCullough contends that the district court abused its discretion in denying her motion to dismiss the indictment because she was denied her Sixth Amendment right to confront witnesses when the government facilitated Venegas' return to Mexico. She argues that she was not required to prove that the government had acted in bad faith

in allowing Venegas to leave, and that the court erred when it took this factor into consideration. She argues that she made a plausible showing that Venegas' testimony would have been material and favorable because Silva's affidavit established that Venegas would have testified that his statement was coerced and that McCullough had no knowledge that he was an illegal alien. Finally, she argues that if she must prove bad faith, the government's actions in allowing Venegas to leave exhibited bad faith.

We review a district court's denial of a motion to dismiss an indictment for an abuse of discretion. *United States v. Waldon*, 363 F.3d 1103, 1108 (11th Cir. 2004), *cert. denied*, 543 U.S. 867, 125 S. Ct. 208, 160 L. Ed. 2d 112 (2004). The Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const., Amend. VI. In *United States v. Valenzuela-Bernal,* 458 U.S. 858, 872, 102 S. Ct. 3440, 3449, 73 L. Ed. 2d 1193 (1982), the Supreme Court considered this issue and concluded that the executive branch's responsibility to execute immigration policy "justifies the prompt deportation of illegal-alien witnesses upon the [e]xecutive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution." The Court stated that the mere fact of deportation was not enough for a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment. *Id.* "A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense." *Id.* In other words, the defendant must show "some reasonable basis to believe that the deported witness would testify to material and favorable facts." *United States v. Saintil*, 753 F.2d 984, 987 (11th Cir. 1985) (internal marks omitted).

McCullough has not satisfied this burden. First, the record does not show that Venegas was deported. *See id.* (noting that giving an illegal alien the option of either leaving voluntarily or being detained does not amount to deportation). Venegas, like the illegal alien in *Saintil*, was given the option of leaving voluntarily or being detained.

Second, it appears that the district court's reason for requiring McCullough to show that Venegas' testimony would have been favorable to her when the government allowed him to leave was based on its concern that the government had not acted in bad faith. The Supreme Court and this Court have suggested that bad faith is an important consideration in determining whether a constitutional violation has occurred. *See Valenzuela-Bernal*, 458 U.S. 858, 872, 102 S. Ct. 3440, 3449, 73 L. Ed. 2d 1193; (stating that it is permissible for the government to deport an illegal-alien witness if the government has made a good faith determination that the witness possesses no evidence favorable to a criminal defendant); *United States v. Avila-Dominguez*, 610 F.2d 1266, 1270 (5th Cir. 1980) (noting, upon denying relief, that "the [g]overnment neither acted in bad faith nor purposefully deprived defendants of their rights"). The government did not act in bad faith when it allowed Venegas to leave the United States voluntarily because at that time, Venegas had only provided incriminating statements about McCullough and there was no reason to believe that Agent Douglas had coerced these statements. Furthermore, the government made every effort to procure Venegas' appearance for trial, contacting Silva on several occasions regarding Venegas' contact information.

Because the evidence shows Venegas was not deported and that the government did not act in bad faith in allowing

him to leave, the district court did not abuse its discretion by denying McCullough's motion to dismiss the indictment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

No. 04-00156-001
USM Number: 08768-003

[Filed May 26, 2005]

UNITED STATES OF AMERICA	)
V.	)
SHANNON McCULLOUGH aka Shannon McCullough Boyington	)

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:
(X) was found guilty on count(s) one and two of the indictment after a plea of not guilty.

The defendant is adjudicated guilty of the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
8:1324(a)(1)(A)(ii)	transportation of an illegal alien	02/09/04	1
8:1324(a)(1)(A)(iii)	harboring and concealment of an illegal alien	05/10/04	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

05/26/05
Date of Imposition of Judgment

s/Charles R Butler, Jr.
SENIOR UNITED STATES DISTRICT JUDGE

06/05/05
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be for a total **term** of **one day in the custody of the U. S. Marshal's lock-up.**

(X) The defendant is remanded to the custody of the United States Marshal.

RETURN

UNITED STATES MARSHAL

By_____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 YEARS.

(X) Special Conditions: The defendant shall participate in the Home Confinement Program for a period not to exceed 120 consecutive days, with electronic monitoring. During this time, the defendant shall remain at her place of residence, and shall not leave except when such leave is approved in advance by the probation office. The defendant shall maintain a telephone at her place of residence without "call forwarding", a modem, "caller ID", "call waiting", or portable cordless telephones for the above period. At the direction of the probation office, the defendant shall wear an electronic monitoring device and follow the electronic monitoring procedures as specified by the probation office. The defendant shall pay the costs of electronic monitoring, and participate in

a program for mental health treatment and/or counseling as directed by the probation office.

For offenses committed on or after September 13, 1994: The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

(X) **The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.**

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall comply with the standard conditions that have been adopted by this court (Probation Form 7a).

The defendant shall also comply with the additional conditions on the attached page (if applicable).

SUPERVISED RELEASE

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) the defendant shall cooperate, as directed by the probation officer, in the collection of DNA, if applicable, under the provisions of 18 U.S.C. §§ 3563(a)(9) and 3583(d) for those defendants convicted of qualifying offenses.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$200.00**	**$0.00**	**$0.00**

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. (or see attached) However, pursuant to 18 U.S.C. § 3644(), all non-federal victims must be paid in full prior to the United States receiving payment.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A (X) Lump sum payment of $ 200.00 due immediately

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the clerk of court,

unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

(X) The defendant shall pay the following court cost(s):
ELECTRONIC MONITORING

Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest, (4) fine principal; (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.